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No. 320

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

UNITED STATES OF AMERICA, *Appellant*

v.

PACKE, DAVIS & COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS OR AFFIRM

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[illegible]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 526

UNITED STATES OF AMERICA, *Appellant*

v.

PARKE, DAVIS & COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS OR AFFIRM

Appellee respectfully moves that the Court dismiss the instant appeal upon the grounds that the sole question raised in Appellant's Jurisdictional Statement was not pressed or passed upon below and that the unchallenged findings of fact of the court below establish that the case upon the merits is moot. In the alternative Appellee moves that the Court affirm the order of the court below upon the ground that the question presented in the Jurisdictional Statement is so unsubstantial as to make further argument to this Court unnecessary.

OPINION BELOW

The opinion, findings of fact, and conclusions of law of the court below are not yet reported but are printed in Appendix A of the Jurisdictional Statement.

JURISDICTION

Appellant invokes the jurisdiction of this Court under Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U.S.C. § 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 989, but jurisdiction under this statute is challenged by the instant motion.

STATUTE INVOLVED

Section 4 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. § 4, provides in pertinent part as follows:

> "The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1-7 of this title; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute *proceedings in equity* to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. . . ." (Emphasis supplied.)

QUESTIONS PRESENTED

Should this Court take jurisdiction of an appeal where in the proceedings below Appellant failed properly to raise, and did not obtain a decision on, the only point presented on appeal, and the District Court made unchallenged findings of fact which render the case moot under prior holdings of this Court?

Is a substantial question presented to this Court by the contention that the District Court should have entered a judgment for the plaintiff on its prima facie case, when the record below conclusively establishes that defendant, foregoing any proof on the merits, successfully interposed the recognized equitable defense that injunctive relief was unnecessary and should not be granted?

STATEMENT

1. Prior Proceedings

On May 2, 1957, the Government filed a standard civil antitrust complaint against Parke, Davis in the United States District Court for the District of Columbia. The complaint stated that it was filed under Section 4 of the Sherman Act "in order to prevent and restrain the continuing violations by the defendant, as hereinafter alleged, of Sections 1 and 3 of the Sherman Act." The first paragraph of the multi-paragraph prayer for relief made the customary request that the District Court "adjudge and decree" that the defendant had violated the Sherman Act, and the next four paragraphs specified the various injunctions being sought against Parke, Davis.

At the trial the Government introduced evidence to show that in July and August of 1956 Parke, Davis had certain dealings with a handful of drug whole-

salers and retailers located primarily in the metropolitan area of Washington, D. C. At the close of the Government's case, and without hearing Parke, Davis in defense, the District Court dismissed the complaint upon the ground, among others, that the Government had failed to prove a violation of the antitrust laws.

On appeal to this Court it was held that the Government's evidence did constitute a prima facie case of antitrust violation. 362 U.S. 29. This Court remanded the case to the District Court "with directions to enter an appropriate judgment *enjoining* Parke Davis from further violations of the Sherman Act *unless* the company elects to submit evidence in defense and refutes the Government's right to *injunctive relief* established by the record." 362 U.S. at 48-9 (emphasis supplied).

2. Proceedings Below

Pursuant to this direction and following a conference with counsel the court set the case for further trial on June 6, 1960.

On June 3, 1960, the Government submitted to the court a document entitled "Supplemental Trial Memorandum" (R. 17-25).[1] This memorandum stated that "the only issue now before the Court" is whether or not an injunction in some form should issue against Parke, Davis (R. 17). For nine pages the memo-

[1] Several of the briefs involved in the proceedings below, including the brief described in the text above, were delivered directly to the judge without at that time being formally "filed" (and stamped as such) in the clerk's office. The documents were subsequently sent to the clerk's office and stamped "Filed" on a date considerably later than that of their original delivery.

randum argued that an injunction should issue, and its "Conclusion" then stated as follows:

> "The Government respectfully submits that this Court should enter a decree enjoining the defendants from further price fixing as requested by the Government in its complaint." (R. 25).

This memorandum, which undertook to define the issues before the District Court in terms of injunctive relief alone, was the only paper filed with the court subsequent to the remand and prior to the reopening of the trial. It said nothing whatever about any other or further relief and contained no suggestion that the Government was seeking or entitled to a judgment apart from injunctive relief.

When Parke, Davis opened its case on June 6, 1960, it presented testimony and documentary proof directed solely to the proposition that injunctive relief in the premises would not be appropriate (June Tr. 3-30).[1] At the close of its evidence on the same day Parke, Davis submitted to the court a document entitled "Defendant's Trial Memorandum on Relief" (June Tr. 31; R. 35-60). This 22-page memorandum was devoted entirely to an analysis of the authorities on the question of the propriety of injunctive relief (R. 35-60). As of this time neither party, on brief or otherwise, had discussed a separate judgment on the merits.

Shortly after the hearing two additional papers were filed by the parties. About June 13, 1960 the Government filed a "reply memorandum on relief" (R. 26-34), and on June 17 Parke, Davis filed a similar docu-

[1] References in this motion (as in the Jurisdictional Statement) to "June Tr." and "July Tr." are to the transcripts of the proceedings of June 6 and July 5, 1960, respectively.

ment (R. 1-15). Both briefs contained lengthy arguments on the question of injunctive relief, but again neither argued the question of a separate judgment.[1]

On July 5, 1960, the District Court announced in open court that it had decided to deny injunctive relief and asked that the parties submit findings of fact and conclusions of law (July Tr. 2-3). Parke, Davis complied with the court's request; on July 11 it submitted "Defendant's Proposed Supplementary Findings of Fact and Conclusions of Law on the Issue of Relief" (R. 84-89). Naturally the document related solely to the issue of injunctive relief and asked that the complaint be dismissed (R. 89).

The Government, on the other hand, submitted no papers of any kind for the court's consideration prior to the opinion and order of the court. At no time did the Government ever submit to the court any proposed form of judgment or decree.

On July 18, 1960, the District Court handed down its opinion and order (R. 66-70). In the opinion the court explicitly stated that the sole issue which it was deciding was "the question of injunctive relief" (App. A, p. 17).[2] It squarely held that an injunction

[1] Only in the final sentence of each brief is there any reference to a judgment. The Government's final sentence, after nine pages of argument on injunctive relief, suggests "that judgment should be had against Parke, Davis and that the injunctive relief called for by the complaint be granted." (R. 34). The defendant's memorandum, after 13 pages of argument on injunctive relief, states in the final sentence that "the Court should withhold the drastic remedy sought by the Government and dismiss the complaint." (R. 15).

[2] References in this motion to "App. A" and "App. B" are to the respective appendices printed with Appellant's Jurisdictional Statement.

should not issue. It also made detailed findings of fact, including a finding of the ultimate fact "that there is now no dangerous probability, or even any reasonable probability or likelihood" that the conduct in which Parke, Davis had briefly engaged in the summer of 1956 would be repeated, either in the metropolitan area of Washington, D. C. or elsewhere (App. A, p. 24).

The District Court also reached two conclusions of law. They read in their entirety as follows:

> "1. Since on the record as a whole the plaintiff is not entitled to the relief it seeks, and
>
> "2. In view of the Supplementary Findings of Fact and under settled principles of equity, the injunctive relief sought by the plaintiff would be unnecessary and inappropriate, it is therefore denied." (App. A, p. 24).

At the same time the court entered the following order:

> "ORDER
>
> "The Court having heard the evidence on the issue of relief, and the Court having reviewed the entire record, considered the briefs of the parties and concluded that, upon the facts and the law, the Plaintiff is not entitled to the relief it seeks, it is
>
> "ORDERED that the injunctive relief sought by the Plaintiff is denied." (App. B).

Nowhere in the Opinion, the Findings of Fact, the Conclusions of Law, or the Order is there any reference to the question of the entry of a judgment on the merits, either in the form of a dismissal of the complaint or otherwise.

On this appeal the Government does not challenge any of the affirmative actions taken by the District

Court. It does not challenge the court's finding that there was no "reasonable probability or likelihood" that the defendant would violate the antitrust laws in the future; it does not challenge the court's conclusion of law that injunctive relief would be inappropriate; and it does not challenge the order's denial of that relief. On this appeal, therefore, the foregoing findings and rulings are accepted as true and correct.

On July 19, 1960, the day after the court had rendered its decision, the Government apparently delivered to the District Court a paper entitled "Government's Objections to Defendant's Proposed Findings of Fact and Conclusions of Law" (R. 71-77, 95-96). The document was not and has not been served upon Parke, Davis or its counsel. Indeed Parke, Davis did not even become aware of its existence until after this appeal had been commenced (R. 91). Yet this is the document upon which the Government primarily relies in claiming here that the allegedly substantial question of law presented to this Court was presented below (Jurisdictional Statement, pp. 6, 8, note 3).

As its title indicates, this paper was an answer to Parke, Davis' proposed findings and conclusions on injunctive relief; its seven-page discussion focused entirely on that issue, which the paper itself described as "the sole issue" before the court (R. 71). The last sentence on the last page stated, "The Government submits that it is entitled to a judgment in its favor, whether or not injunctive relief is granted." (R. 77). This was the only point in these extended proceedings at which the Government, by referring to a judgment separately from an injunction, even approached the point of raising the question of law presented on this appeal.

Parke, Davis was neither aware of nor a party to any of the communications between the Government and the District Court after July 18, 1960 (R. 91, 95-96). Neither the untimely "Objections" of July 19, 1960, nor the other *ex parte* communications (R. 95-96) are properly included in and evidenced by the record on this appeal. Under these circumstances it is difficult to see how the Government can now assert that its statements to the court after July 18 constituted a "request for reconsideration" which properly raised below the question of law which this Court is asked to review (Jurisdictional Statement, p. 8, note 3).

After July 19, 1960, the Government took no further action in the District Court. It did not seek a rehearing. It did not file a motion for the entry of a judgment in its favor, either by a motion to amend the order of July 18, 1960, or otherwise. See Federal Rules of Civil Procedure 59(e). It simply filed a notice of appeal to this Court.

ARGUMENT

I. THE APPEAL SHOULD BE DISMISSED

1. SINCE THE QUESTION NOW RAISED BY THE GOVERNMENT WAS NEITHER PRESSED NOR PASSED UPON BELOW, IT CANNOT PROPERLY BE BROUGHT BEFORE THIS COURT NOW.

An examination of the record shows a basic weakness in the Government's position on this appeal. The simple facts are that the parties and the court below addressed themselves solely to an issue which is not raised here, and that they did not deal below with the only question which the Government now asks this Court to review.

As the Statement above clearly shows (pp. 4-9, *supra*), after the remand of this case the parties con-

centrated exclusively upon the issue of injunctive relief throughout the proceedings below. Not one word was said about the allegedly "important" question of law which arises, according to the Government, under Section 5 of the Clayton Act of 1914 (15 U.S.C. § 16). Although the Government made two or three cryptic references to a judgment in its favor, the words were all but completely buried in the arguments on the injunctive issue, and when the District Court rendered its decision, it expressly stated that the latter issue was the only question which it was deciding.

This appeal, therefore, does violence to a well established principle of this Court. As the Court said in *Duignan* v. *United States*, 274 U.S. 195, 200,

> "This Court sits as a court of review. It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed."

Accord, *Blair* v. *Oesterlein Co.*, 275 U.S. 220, 225; *Lawn* v. *United States*, 355 U.S. 339, 362. Since there is present here none of the exceptional circumstances which are required to justify a departure from this fundamental rule (*e.g.*, that the court below lacked jurisdiction over the action), the rule by itself calls for a dismissal of the appeal.

2. THE DISTRICT COURT'S UNCHALLENGED FINDING THAT THERE IS NO "REASONABLE PROBABILITY OR LIKELIHOOD" OF FUTURE ILLEGALITY HAS RENDERED THE CASE MOOT AND THIS APPEAL UNTENABLE.

Under the terms of the statute invoked by the Government in bringing this suit, this is a "proceeding in

equity"[1] in which the judicial powers of disposition are only "those traditionally exercised by courts of equity." *DeBeers Mines* v. *United States*, 325 U.S. 212, 218-19; *accord*, *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344, 377. Accordingly, the only legitimate judicial objective in a suit of this kind is that of preventing the defendant from violating the antitrust laws in the future; a suit for an injunction may not be employed "to punish past violations or to simply establish that violations had occurred."[2] It is with these considerations in mind that this Court has long adhered to the principle that a suit in equity becomes "moot" on the merits "if the defendant can demonstrate that 'there is *no reasonable expectation* that the wrong will be repeated.'" *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 633 (quoting the test of mootness laid down by Judge Learned Hand in *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 448 (2d Cir. 1945)) (emphasis supplied).[3]

[1] The complaint, whose stated purpose was "to prevent and restrain" future violations of the Sherman Act, was expressly brought under Section 4 of the Sherman Act (15 U.S.C. § 4), which authorizes only "proceedings in equity to prevent and restrain" violations of the Act.

[2] Walling v. Shenandoah-Dives Mining Co., 134 F. 2d 395, 397 (10th Cir. 1943); *cf.*, Hecht Co. v. Bowles, 321 U.S. 321; Mitchell v. Bland, 241 F. 2d 808 (5th Cir. 1957); Mitchell v. Chambers Construction Co., 214 F. 2d 515 (10th Cir. 1954); Walling v. T. Buettner & Co., 133 F. 2d 306 (7th Cir. 1943), *cert. denied*, 319 U.S. 771.

[3] Parke, Davis does not contend that a determination that injunctive relief should not be granted is equivalent to a determination of mootness. In many cases, including the *Grant* case, *supra*, Federal courts have held that the question on the merits was not moot, even though the evidence showed that injunctive relief was inappropriate in the circumstances. The distinction, obviously, is a matter of degree, but the language of the cases has provided

Parke, Davis has squarely met this test. Its evidence, documentary and testimonial, led the court below to the specific finding that there is now *no "reasonable probability or likelihood"* that the conduct of Parke, Davis in 1956 will be repeated (Finding of Fact 14; App. A, p. 24), and the Government has now acquiesced in this finding. By this Court's test, therefore, the case on the merits is moot, the Court is without jurisdiction to hear the appeal, and the appeal must be dismissed.[1]

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a reasonably practical test: if the evidence shows *some* "reasonable expectation" that the defendant will violate the law in the future but does not show that "dangerous probability" or "cognizable danger" of future illegality which would justify injunctive relief, the case is not moot but an injunction will not issue. *United States* v. *W. T. Grant Co., supra.* On the other hand, if there is "*no* reasonable expectation" of future illegality, the case is moot and the court will neither issue an injunction nor consider the merits. See *United States* v. *W. T. Grant Co., supra; accord*, Murphy v. Benson, 270 F. 2d 419 (2d Cir. 1959); United States v. Logan Co., 147 F. Supp. 330 (W.D. Pa. 1957); United States v. Insurance Board of Cleveland, 144 F. Supp. 684, 691-95 (N.D. Ohio 1956).

[1] The Government's demand in this Court for a judgment declaring the fact of violation, even though injunctive relief is admittedly inappropriate, constitutes in effect a demand for a declaratory judgment. But in actions for declaratory judgments the Federal courts have applied substantially the same test of mootness as has been applied in equity proceedings for injunctive relief. See Papaliolios v. Durning, 175 F. 2d 73, 75 (2d Cir. 1949); Clark v. Flory, 237 F. 2d 597 (4th Cir. 1956), *affirming per curiam*, 141 F. Supp. 248 (E.D.S.C. 1956); Tonkins v. City of Greensboro, 162 F. Supp. 549 (M.D.N.C. 1958), *modified*, 175 F. Supp. 476 (M.D.N.C. 1959), *aff'd per curiam*, 276 F. 2d 890 (4th Cir. 1960); *cf.*, Taylor v. McElroy, 360 U.S. 709.

II. SINCE THE QUESTION PRESENTED HERE IS SO UNSUBSTANTIAL AS TO MAKE FURTHER ARGUMENT UNNECESSARY, THE ORDER OF THE DISTRICT COURT SHOULD BE AFFIRMED.

Consistent with the principle that an equity proceeding for an injunction may not be employed "to simply establish that violations had occurred" in the past (see page 11, *supra*), the traditional equity rule is that if the defendant in such a proceeding demonstrates that injunctive relief would be inappropriate, he has in effect made out a complete defense. Even though the plaintiff may have established a prima facie case of past violation, the courts have consistently entered a judgment for the defendant[1] or an order dismissing the complaint[2] where the defendant, without meeting the prima facie case, establishes that there is no basis for injunctive relief. The principle is as applicable in a suit under Section 4 of the Sherman Act as it is in any other proceeding in equity.[3] Until now,

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[1] Mitchell v. Empire Gas Engineering Co., 256 F. 2d 781 (5th Cir. 1958); Mitchell v. Bowers, 157 F. Supp. 344 (W.D.S.C. 1958); Tilbury v. Rogers, 123 F. Supp. 109 (W.D. La. 1954) (entering judgment for the defendant in No. 4040), *aff'd per curiam sub nom.* Tilbury v. Mitchell, 220 F. 2d 757 (5th Cir. 1955), *cert. denied*, 350 U.S. 839; *cf.*, United States v. National City Lines, 134 F. Supp. 350 (N.D. Ill. 1955); Walling v. Nashville C. & St. L. R. Co., 330 U.S. 158.

[2] United States v. United States Steel Corp., 251 U.S. 417, 445; Walling v. T. Buettner & Co., 133 F. 2d 306 (7th Cir. 1943), *cert. denied*, 319 U.S. 771; Fleming v. National Bank of Commerce, 41 F. Supp. 833 (S.D. W. Va. 1941); *cf.* Walling v. Hardwood Co., 325 U.S. 419; Stokely-Van Camp, Inc. v. Federal Trade Commission, 246 F. 2d 458 (7th Cir. 1957). See also, Hecht Co. v. Bowles, 321 U.S. 321.

[3] See United States v. United States Steel Corp., *supra*; *cf.* Standard Oil Co. v. United States, 283 U.S. 163, 181-82. Compare Appalachian Coals, Inc. v. United States, 288 U.S. 344, 377; DeBeers Mines v. United States, 325 U.S. 212, 218-19.

therefore, an antitrust defendant has always been entitled to assume that if he could produce evidence to show that injunctive relief would be inappropriate, there would be no need whatever to go to the trouble and expense of putting in a defense on the merits with a corresponding burden upon the court.

In this proceeding, however, the Government has now come forward with an admittedly novel theory which squarely conflicts not only with the traditional equity practice but also with principles of sensible judicial administration which were incorporated into the law when the Congress enacted the Sherman and Clayton Acts in 1890 and 1914. The Government's argument is that in an equity proceeding under those statutes, after a prima facie showing of past antitrust violations, the plaintiff has a positive statutory right to a declaratory judgment against the defendant, no matter how obvious it may be that the intervention of a court of equity is in no way required. The alleged justification for this proposal is that a declaratory judgment entered by a court of equity might conceivably benefit potential treble damage plaintiffs who are not before the court, who may not exist at all, and who, if they do exist, may never seek to assert their claims.

Quite apart from the fact that in the past forty-six years no court has ever recognized its affirmative statutory "duty" as now hypothesized by the Government—and setting aside the fact that similar arguments have been rejected in the past[1]—the logical implications of

[1] In United States v. W. T. Grant Co., 345 U.S. 629, upon which the Government here relies, the District Court in the proceedings below (112 F. Supp. 336 (S.D.N.Y. 1952)) recognized the possi-

the argument are enough to defeat it. Consider, for example, the situation in this case. Parke, Davis, relying on the established rules, successfully interposed the standard equitable defense that there was no basis for injunctive relief in the circumstances. Because the merits of the antitrust questions were not relevant to that defense and required no discussion at the trial of June 6, 1960, Parke, Davis was able to present its case in a very brief time with a minimal burden for the parties and the court. If the rule proposed by the Government is accepted, however, no defendant in a suit under Section 4 of the Sherman Act will ever again be able to follow this economical and sensible course. Under the Government's theory every such defendant must either accept an adverse declaratory judgment, with consequent treble damage exposure under Section 5 of the Clayton Act, or put in a complete defense on the merits, even though the case may admittedly be one in which a court of equity should not intervene at all.

The implication of these arguments is that the Congress considered the interests of treble damage plaintiffs to be of such overriding importance that the parties and the court in a Government civil antitrust suit should be required to litigate the antitrust issues through to their ultimate conclusion, whether or not such time-consuming litigation would serve the inter-

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bility that the defendants had violated the anti-trust laws in the past, but the defendants demonstrated that the challenged arrangements had been terminated. Despite the latter showing the Government insisted that it was "entitled to a decree that the defendants have violated" the law. 112 F. Supp. at 337-38. The District Court held, however, that the defendants were entitled either to a dismissal of the complaint or to a judgment in their favor. Judgment was entered for the defendants, and this Court affirmed.

ests of the parties to the Government suit itself. This is clearly not what the Congress intended. For example, Section 5 of the Clayton Act, the Government's own touchstone, itself provides in effect that if the Government and the defendant can avoid litigation of the antitrust issues by settling the issues through a consent decree, they may do so, even though such a decree will deprive theoretical treble damage plaintiffs of the advantages of a litigated judgment of the kind for which the Government here contends. Thus the Congress has affirmatively encouraged the parties to shorten their contest through normal procedures, consistent with established equity practice, without regard to the treble damage problem. When these considerations are coupled with the fact that Section 4 of the Sherman Act, under which this suit is brought, clearly incorporates the sensible time-saving rules traditionally employed by courts of equity,[1] it becomes clear that the Government's new-found and surprising theory of the law is so unsubstantial as not to deserve argument in this Court.[2]

Accordingly, even if the Court should conclude that jurisdiction to hear this appeal is not lacking, the order of the District Court below should be allowed to stand without further proceedings here.

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[1] See note 3, p. 13, *supra*.

[2] A number of the peripheral arguments presented by the Government are unrealistic in the context of this case. For example, the Government's argument that a declaratory judgment against Parke, Davis is necessary here in order to support Government damage suits (see Jurisdictional Statement, pp. 11-12) is wholly fallacious. None of the relatively insignificant transactions challenged in this case involved the Government in any way, and there has been and can be no suggestion that the Government has any kind of a damage claim against Parke, Davis.

CONCLUSION

For the foregoing reasons this Court should dismiss the instant appeal or, in the alternative, affirm the order of the court below.

Respectfully submitted,

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